



THE

# Hungarian Historical Review

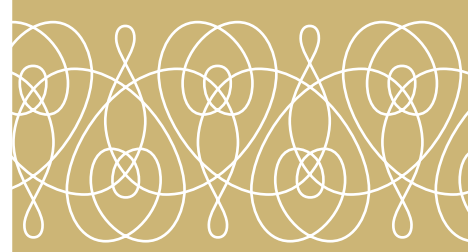
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*Moving Borders  
in Medieval Central Europe*

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## *Moving Borders in Medieval Central Europe*

András Vadas and János M. Bak  
Special Editors of the Thematic Issue

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## Border by the River – But Where is the River? Hydrological Changes and Borders in Medieval Hungary\*

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Medieval estate borders were mostly formed by natural borders, such as hills, ditches, forests, meadows, etc. Of course, in many cases trees were marked in some form, or small mounds were built to clarify the running of estate borders. Almost none of these would seem at a first sight as firm as a border along rivers and streams. However, a closer look at law codes, customary law collections, and legal disputes that arose in connection with estate borders makes clear that, as borders of estates, bodies of water could be a basis for conflict. In this essay, I discuss sources from the medieval Kingdom of Hungary from the thirteenth to the sixteenth centuries that concern the problem of the change of land ownership as a consequence of changes in riverbeds. In the late medieval compilation of the customary law of Hungary by Stephen Werbőczy, the *Tripartitum*, a surprisingly long section is dedicated to this problem. He clearly suggests that landownership does not change if a piece of land is attached to another person's land by changes in the course of a river. Historians have drawn attention to this section of the *Tripartitum* and have suggested that this is one of the few parts in which Werbőczy does not apply Hungarian customary law, but rather uses Roman law. In my paper, which is based on a collection of similar lawsuits, I aim to demonstrate that there are a number of examples of cases in which Roman law prevailed before Werbőczy's work, and, thus, the land in question was left in the hands of the previous owners as well as decisions according to which the shifting riverbed went with a change in ownership.

Keywords: Legal history, water history, customary law, rivers, boundaries

### Introduction

This river [the Tiber] moreover circles that splendid mountain on which the city of Perugia is situated and while flowing a great distance through its district, the river itself is bordered by plains, hills and similar places (...) when I was resting from my lecturing and in order to relax, was travelling towards a certain vacation house situated near Perugia above the Tiber, I began to contemplate the bends of the Tiber, its alluvion, the islands arising in the river, the changes of the river-bed

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as well as a host of unanswered questions which I had come across in practice. (...) I began to consider in various ways what the legal position was, not believing that I would take it any further (...) while I slept that night, I had a vision near dawn that a certain man, whose countenance I found gentle, came to me and he said the following: 'Write down what you have begun to think about and since there is a need for illustration, provide mathematical diagrams[.]'<sup>1</sup>

The quotation above is from the prologue of a treatise by Bartolus de Saxoferrato (Sassoferrato), one of the most celebrated jurists of the fourteenth century. Bartolus, who was probably one of the most influential and, by 1355 (when this text was written), busy professors at the University of Perugia, decided to take some time off during the year. As is mentioned in the text, he headed to a villa (the location of which has not been identified by historians) overlooking the valley series of the Tiber. There, he began considering the question of who the islands emerging in the river belonged to and what happens with the ownership of a certain piece of land when the river which constitutes its border starts to meander along a different path, eroding parts of one person's property and adding them to the far bank.

As suggested by the prologue, which is not lacking in topoi, Bartolus first thought it was an eccentric idea to discuss an issue like this in a treatise until a mysterious man, who occurred in his dream, urged him to do so. The anecdotal story behind the inspiration of the treatise known as *Tractatus de fluminibus seu Tyberiadis* (or sometimes referred to in an abbreviated form simply as *Tyberiadis*) may not have had much connections to what actually happened, and it is difficult to believe that the whole treatise could have been completed in just a few weeks' time, as Bartolus suggests. Existing scholarship on the treatise attributed major importance to the circumstances of the formation of the work, especially the possible vacation and the location of the villa mentioned.<sup>2</sup> These questions are important, of course, from the point of view of Bartolus himself, but they are probably less crucial with respect to the present essay. What is more interesting in the context of this discussion is simply that a major authority on Roman law at the time engaged in writing a work dedicated to the topic. It is worth noting

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1 du Plessis, *An Annotated Translation*, 35. (I consulted the translation, but corrected it at certain places.) For the best edition of the prologue, see Cavallar, "River of law," 84–116. For the printed editions of the work, see Bartolus *Tractatus* [1576] and Bartolus, *Tractatus* [1960] (with the reprint of the 1576 edition of the text).

2 For the political context of the writing, see Walther, "Wasser in Stadt und Contado," 889–90. See also: Cavallar, "River of law."

that it seems from the above quote that he did not consider the question worthy of similar treatment.<sup>3</sup> The prologue is somewhat controversial, as Bartolus also states that he encountered similar problems during his legal practice.

Bartolus' work consists of three parts and focuses on two questions: who owns the land if an island emerges from a river and, when the river changes course, how should the borders of the connected estates be demarcated? One of the most important features of the treatise is that, in its argumentation, it combines legal reasoning and geometry. Bartolus drew numerous geometric figures with which he meticulously described how newly emerging islands or newly emerging lands connected to the existing lands should be divided. There are several variants of these drawings (because of the manuscript tradition), but an autograph fragment of the *Tyberiadis* preserved many figures which can be associated with Bartolus himself.<sup>4</sup>

Although as noted above, historians have tended to focus on the circumstances of the creation of the work and have dealt less with the text itself, the problem touched upon by it does come up in a number of law codes, customary law collections, and different documents related to lawsuits. And as mentioned, the very fact that Bartolus engaged in writing such a work suggests that the problem was not as rare as it may seem at a first glance. To what extent were the questions he was raising important as matters of theory? To what extent did he mean to offer an example, with this text, of the potentials of combining geometry and law instead of simply addressing a legal problem? Does the Hungarian source material offer insights into similar problems? How were such cases resolved in medieval Europe and in Hungary? In this essay, I discuss these problems on the basis of legal evidence, more specifically, the example of legal codes, customary law collections, and, most importantly, diplomas that settled similar, land-related disputes.

Despite the fact that Bartolus' work discusses in detail what happens if a piece of land emerges on the bank of a river because of alluvial activity, he partly disregards a problem which, in light of the Hungarian source material, appears to have been a recurring issue.<sup>5</sup> He never considers what exactly happens if

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3 "Et circa multa dubia que de facto occurrerant et alia ego ipse ex aspectu fluminis excibatam, quid iuris esset, cepi aliquantulum intueri, non tamen credens ultra procedere, ne recreationem propter quam accesseram impedirem" Cavallar, "River of Law," 84 (Appendix).

4 Cf. Cavallar, "River of law."

5 Although the problem of emerging islands also appear in Hungarian legal documents. E.g. *Anjoukori okmánytár*, vol. 1. 94–95 no. 87; *ibid.*, vol. 4. 10–12 no. 10. See also the case referred to in note 40.

the piece of land in question used to be the property of the landlord of the other bank of the river, i.e. it did not emerge from the river, but was detached from one person's property and attached by the river to a property belonging to someone else. In the cases Bartolus discusses, the principles of geometry can be applied using geometrical diagrams. The general principle he suggests is quite easy to explain in the sense that it aligns the ownership of the islands on a bank to the parallel landownership. In Bartolus' treatise, the same applies to lands which emerge from the alluvium in consequence of years of accumulation. This phenomenon in Roman law is usually referred to as *accretion*, and it was adjudicated in the ancient legal tradition in the same manner as used by Bartolus.<sup>6</sup> This was not only important in cases of meandering rivers, but also in the case of lands emerging along seashores.<sup>7</sup> Of course, in the medieval Kingdom of Hungary and probably with a few exceptions, everywhere in Europe, the formation of new lands was a consequence of shifts in the flow of rivers rather than the movement of seawaters. This process in legal tradition is usually referred to as *avulsion*. It can be considered a special form of *accretion*. As noted, Bartolus did not suggest a definitive solution to this question. It is not clear why was the question partly omitted by Bartolus. It can be connected to the fact that the most important motivation for the work was to demonstrate the possibilities of integrating geometry and law. This works well in the classical cases of *accretion*, but in the case of *avulsion*, the legal principle is the main question, and there is little space for geometry. Even if Bartolus disregarded this particular problem, it nonetheless was clearly a recurrent issue in historical times going back to the period before the birth of pragmatic literacy.

As a consequence of this, historians have devoted some attention to the problem for quite some time now. It has been discussed in at least three quite distinct fields of research: property rights in general, history, and geography/geomorphology. Historians were the first to study the problem. In most cases, they analyzed emblematic events on a local scale and considered how the processes in question impacted societies and economic and political structures. The most important example was a major hydrological change in the valley of the River Po. The event, usually referred to as *Rotta della Cucca* (Cucca breach), first attracted the attention of Italian historians in the eighteenth century. Ludovico Antonio Muratori, one of the pioneers of the study of medieval Italy, was the

6 Sax, "The Accretion/Avulsion Puzzle," 305–67.

7 Augustyn, "Evolution of the dune ecosystem," and Augustyn, "De evolutie van het duinecosysteem."

first historian to discuss the Cucca breach.<sup>8</sup> The basis for the assessment of the event is a chapter in Paul the Deacon's *History of the Lombards*, in which Paul describes the floods of 589. As he notes, in this year, several floods occurred along different rivers in Italy of which the most dangerous was that of the River Adige.<sup>9</sup> Scholarship, building a great deal on the work of Muratori, saw the event as the main force in the transformation of the riverine landscapes and the course of the Po and Adige Rivers. It created extensive marshlands in the surroundings of the mouth of the two rivers and transformed the borders of properties in Veneto. In recent decades, historians have criticized this oversimplifying view of the landscape changes in the region and have tended to see it as a long process during which the channel system maintained by the Roman administration and taken over by the Lombards was intentionally abandoned. The marshes that came into being as a consequence of the end of the maintenance works proved to useful as a form of protection for the northern Italian territories against the Exarchate of Ravenna.<sup>10</sup>

In the explanation of the processes involved, the change in the landholdings was only a marginal issue, but it nonetheless drew the attention of scholars to the fact that riverine landscapes were not nearly as fixed in the Early (or High or Late) Middle Ages as they became in the twentieth and twenty-first centuries, by which time most of the rivers in the densely inhabited areas of Europe has gone through long regulation processes. This probably is the most thoroughly studied medieval landscape change brought about by shifts in riverbeds, but at least one further area is worth emphasizing. Going back to the nineteenth century, research on the changing waterscapes of the Low Countries also generated interest among Dutch and Flemish historians. As was true in the Italian case, the most important element of the geographical processes which caught the attention of historians was not primarily the change in individual

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8 For Muratori's reading of the 589 floods, see idem, *Annali d'Italia*, 339. On this, see Squatriti, "The Floods of 589," 801.

9 "Eo tempore fuit aquae diluvium in finibus Veneciarum et Liguriaie seu ceteris regionibu Italiae, quale post Noe tempore creditur non fuisse. Factae sunt lavinae possessionum seu villarum hominumque pariter et animantium magnus interitus. Destructa sunt itinera, dissipatae viae, tantum tuncque Atesis fluvius excrevit, ut circa basilicam Beati Zenonis martyris, quae extra Veronensis urbis muros sita est, usque ad superiores fenestras aqua pertingeret [...] Urbis quoque eiusdem Veronensis muri ex parte aliqua eadem sunt inundatione subruti." Paulus Diaconus, *Historia Langobardorum*, III. 23. For its edition, see Paulus, *Historia Langobardorum*, 127–28.

10 Until now the most detailed treatise of the problem is: Squatriti, "The Floods of 589," 799–826. With a thorough criticism of the earlier secondary literature.

estate borders, but rather the major transformation of long stretches of the seashores. Documentary and cartographic documents were the first sources used by historians in the Low Countries, but as is true in the case of Italy, in the last half century, research done by geographers and geomorphologists has significantly widened the opportunities to study the hydrological processes of the Holocene, or in this case, the Late Holocene. Geographers in most cases working together with historians, have shown the potential of research on the avulsion histories of particular rivers in the Low Countries,<sup>11</sup> southern France,<sup>12</sup> and other parts of Europe.<sup>13</sup>

The use of written, cartographic evidence combined with geomorphology not only lead to studies on changes in riverine landscapes and, accompanying this, the connected land holding structure in Western Europe, but also produced studies addressing the problem in Central Europe and in Hungary in particular. A number of works were dedicated to the changes in the waterscape around Vienna in the late medieval period and the Early Modern times, changes which resulted in a series of lawsuits between the landowners by the Danube.<sup>14</sup> Research also demonstrated significant changes in the riverine landscapes in the Carpathian Basin in historical times, including the Danube River,<sup>15</sup> the Rába river,<sup>16</sup> the Tisza River,<sup>17</sup> and the Dráva River<sup>18</sup> valleys.<sup>19</sup> Most of the above mentioned studies, however, addressed the riverbed changes and the alluvial development of major rivers in Europe. Much less attention has been dedicated to minor rivers and streams, despite their potential relevance. There is ample and adequate source material in part because, like the major rivers, in many cases minor rivers were also boundaries of estates, as is evident on the basis of

11 Kleinans, Weerts, and Cohen, "Avulsion in action." See also: Törnqvist, "Middle and late Holocene avulsion," 711–14, Soens, "The origins of the Western Scheldt," and Trusen, "Insula in flumine nata."

12 Provansal, Pichard, and Anthony, "Geomorphic Changes in the Rhône Delta," and Carozza et al., "Lower Mediterranean plain accelerated."

13 Thoen et al., *Landscapes or seascapes*.

14 Sonnlechner, Hohensinner, and Haidvogel, "Floods, fights and a fluid river," and Hohensinner et al. "Changes in water and land." See also: Hohensinner et al., "Two steps back, one step forward: reconstructing the dynamic Danube."

15 E.g. Pišút, "Príspevok historických," 167–81; Pišút and Timár, "A csallóközi (Žitný ostrov) Duna-szakasz," 59–74 or Székely, "Rediscovering the old treasures of cartography."

16 Vadas, *Körmend és a vízeke*, 22 and 67.

17 E.g. Timár, Sümegi, and Horváth, "Quaternary Dynamics of the Tisza River."

18 Kovács and Zatykó, "*Per sylvam et per lacus nimios*," esp. the contribution by István Viczián, "Geomorphological research in and around Berzence."

19 See more recently the contributions of Bence Péterfi and Renáta Skorka to the present issue of the *Hungarian Historical Review*.

hundreds of perambulation documents, boundary markers, and cartographic data. The Hungarian source material, especially up to the late fourteenth century, is somewhat exceptional in this sense, as perambulations make up probably as much as seven to eight percent of the whole of the medieval legal source material.<sup>20</sup> In case of legal disputes concerning the riverbed changes, this group of sources will be of crucial importance to this discussion, as perambulations in most cases were done as stages of legal disputes, and one of the most important kinds of disputes (if not the most frequent) involved changes in riverbeds. These legal disputes concerned not only natural changes in the hydrogeography, but also artificial riverbed modifications for mill races, fish ponds, irrigation, etc. which in some cases went with changes to the borders of estates. Along with historians and specialists in geomorphology, as mentioned earlier, legal writers also devoted attention to the legal problems created by the changing riverbeds in sections where the rivers were boundaries themselves. They mostly contributed to the problem by analyzing the collections of Roman law and considering the contemporary implications of avulsion.<sup>21</sup>

All of the approaches listed above are important with respect to the present paper, as in many cases they contribute to the contextualization of the results based on the Hungarian source material. In the next subchapters, drawing on the source material from the medieval Kingdom of Hungary, I will argue that the problem raised by Bartolus is not entirely theoretical, and there was a more or less stabilized customary law concerning how to resolve the similar disputes, even if it was not based on the principles he argued for.

### *The Border between Lúbotín and Orlov – What can a Single Case Reveal?*

In 1349, one of the landlords in Sáros County, Rikalf son of Rikalf, supplicated to King Louis I according to which the Poprad River had detached a tract from his land called Lúbotín (Lubotény). While the river had demarcated his land from the village of the king called Orlov (Orló), when its course changed, it flowed through his estate, Lúbotín.<sup>22</sup> The question of the ownership of the lands of Lúbotín may have not been simple, as only a quarter of a century earlier, the

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20 On the source type, see Szabó, “Sources for the Historian of Medieval Woodland,” 268–71. On the proportion of perambulation documents in the surviving documentary evidence, see: Szabó, “Medieval Trees and Modern Ecology,” 12–17.

21 E.g. Sax, “The Accretion.”

22 MNL OL DL 68 894 (September 14, 1349) and 68 895 (July 5, 1349 and October 5, 1349).



family had had to appeal to King Charles I as Phillip Druget, the influential Italian nobleman and member of the king's entourage, had attempted to obtain some of the lands that belonged to Lúbotín.<sup>23</sup> The endeavor of the Drugets may not have come as a surprise, as this was the period in which the family rapidly extended its power in the region, but the Poprad River's changing riverbed may not have been among the potential threats with which Rikalf had calculated.<sup>24</sup> In answer to the appeal, King Louis ordered Sáros County to investigate the case. The investigation was led by a noble magistrate (*iudex nobilium* or *szolgabíró* in Hungarian) of the county named Tivadar and a bailiff (*homo provincie*), a certain Jacob son of Sükösd.<sup>25</sup> In the course of the investigation, they interrogated the local nobility and tenant peasants, especially those of two nearby settlements, Plaveč (Palocsa) and Gerlavágása (a lost settlers' village somewhere close to three previously mentioned settlements). The investigation came to the conclusion that the suppliant was right and the Poprad River indeed had detached pieces of lands from Rikalf's property.<sup>26</sup> According to the documents related to the case, the change in the riverbed happened without human intervention. It was probably caused by floods which changed the hydrography of the area, although this was never explicitly stated in the sources.<sup>27</sup>

Despite the verification of Rikalf's claim, the case was probably not settled, as ten years later, in 1359, the question was again brought to the court by Rikalf's family. Based on the documents issued in 1359, it is safe to assume that the lands in question during the ten years between the cases were used by the kings' tenant peasants, and the territories in question were never returned to Rikalf and his family. This is interesting in light of the fact that obviously the intention of Rikalf in 1349 was to get back the lands in question, and the investigation concluded with the acknowledgement that lands originally had been in his possession. This suggests that in these cases, land was thought to belong to the original owners, in this case Rikalf. But apparently it took ten years to gain back these pieces of land in response to the complaint of Rikalf and Peter son of Ladislaus, from the same family. In the end, the lands were reassigned not (or not only) because

23 MNL OL DL 68 795 (April 10, 1324). Cf. Zsoldos, "Hűség oligarchák," 347.

24 On the Drugets, see Zsoldos, *A Druget-tartomány*.

25 On the noble judges of Sáros County, see Kádas, "Sárosi 'reform' Miklós fia Miklós ispánsága idején," 127–44. For Tivadar *ibid.*, 135.

26 MNL OL DL 68 895. (For a summary, see *Anjou-kori oklevéltár*, vol. 33. 255 no. 505), MNL OL DL 68 894. (For a summary, see *Anjou-kori oklevéltár*, vol. 33. 335–36 no. 684), and MNL OL DL 68 895 (for a summary, see: *Anjou-kori oklevéltár*, vol. 33. 364 no. 745).

27 On similar cases, and the role of floods in that, see Kiss, *Floods and Long-Term Water-Level Changes*.



they originally belonged to Rikalf's family, but because of the merits of the family in service of King Louis I.<sup>28</sup> This time, the document clearly referred to the reason for the change in the riverbed. As was already probable from the documents from 1349, the river's main flow was not modified artificially, but was identified as a consequence of the rapid current of the river. This time, the case was settled with a reinstitution of the previous owners to the lands in question in the presence of a deputy of the chapter of Szepes (Spišská Kapitula) and a *homo regius*. As usually done in these cases, a new perambulation of the land in question was carried out in which a section is described as the former bed of the Poprad River.

Even if, in 1359, the land in question seems to have been clearly reassigned to Rikalf and his family, the case was not settled for the rest of the Middle Ages. Almost fifty years after this episode, in 1405 at the noble assembly of Abaúj and Sáros Counties held in Košice, the noble judges and vice-counts (*vicecomites*) of the latter county testified that the same lands that had been disputed in 1349 and 1359 originally belonged to Ľubotín and thus rightfully belonged to the successors of Rikalf.<sup>29</sup>

The set of documents relating to the case of the lands by the Poprad River between Ľubotín and Orlov reveals a number of important issues. In 1349, according to the surviving sources Rikalf attempted to prove that the Poprad River had changed its bed because proving this would have allowed him to keep using the lands despite the fact that by then they were on the other bank of the Poprad River. This suggests that even if the change in the riverbed of the Poprad River took place as part of a natural process, this still would not have changed the landownership. However, the picture is less clear in the case of 1359, when the lands in question were (re)instituted to the Rikalf sons in return for their service and not because they had belonged to the family. Nonetheless, the fact that the same lands were reinstituted to the Rikalf family suggests that the question was also connected in some way to the notion of previous ownership. In light of the seemingly contradictory documents, it is certainly worth considering whether there was a customary law in medieval Hungary which would have applied to similar cases.

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28 MNL OL DL 68 916 and MNL OL DL 68 917.

29 MNL OL DL 68 950 (for a summary, see *Zsigmondkori oklevéltár*, vol. 2/1. 641 no. 5091).

### *Riverbed Changes and Estate Borders – Was There a Medieval Customary Law in Hungary?*

In an article cited above a number of times, István Tringli not only discussed mill construction but also devoted some attention to the problem I am addressing here. He suggested that the changes of estate borders in consequence of riverbed changes may have been a problem of minor importance in medieval Hungary, and these issues were certainly minor compared to the lawsuits concerning water mills. Simply the number of lawsuits related to the two problems shows that milling rights were more frequently occurring problems than lawsuits related simply to riverbed changes. By the thirteenth and especially by the fourteenth century, the number of mills in Hungary was high enough that the buildings had become obstacles to one another. As was shown, this gave ground to the formation of a relatively well-defined customary law related to the use of waters and the construction of water mills.<sup>30</sup> However, the lasting struggle for the ownership of the lands between Lobotín and Orlov suggests that with regard to riverbed changes, the norm either was anything but clear or the tenants of Orlov, who belonged to the land of the king, attempted to use their favorable position against Lobotín. The picture is not clear based on this one case study, but it becomes somewhat clearer if one looks at a number of cases. But before doing so, I turn to the seemingly most self-evident source one can touch upon when discussing whether there was a customary law on a specific question, namely the *Tripartitum* by Stephen Werbőczy, compiled in the 1510s. Werbőczy discusses the question in a surprisingly extensive manner compared to its seemingly minor importance:

Then, as the boundaries and borders of many free cities, villages, estates and many towns and deserted lands are set and defined by rivers and streams; and by the flood and force of these waters often large pieces of land, meadows and woods are separated, carried away and attached to the area of another neighboring city, town or estate; since the river, driven by vehement flood often strays and spills from its usual course, flow and bed into a new bed; so some people think and believe that the lands, meadows and woods that were annexed and attached to the area of another neighboring free city, town or village due to a change in the flow, course or bed of the river ought to belong to and come into the

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30 Tringli, “A magyar szokásjog a malomépítésről,” and Vadas, “Terminológiai és tartalmi kérdések.” The latter in a shortened English version is available in Vadas, “Some Remarks.”

possession of that free city, town or village; arguing and stating that their boundaries are set by the flow, course and bed of the river. But this opinion is not correct.

[1] For, this way many frauds could be committed, and the waters and rivers—with hidden canals, and sometimes by making shallow dikes, or raising dams or filling up the bed—could be driven into a new course and bed in any direction, according to will; thus someone could easily usurp another's lands, woods and meadows.

[2] Therefore the opposite opinion shall be accepted as correct (...) <sup>31</sup>

These points of Werbőczy's work were discussed first in the nineteenth century. In his discussion of this part of the *Tripartitum*, Rezső Dell'Adami suggests that, unlike in the overwhelming majority of the work, in this case, Werbőczy applied the principles of Roman law and not Hungarian customary law.<sup>32</sup> In the 1930s, Alajos Degré came back to the question and also drew attention to the fact that Hungarian customary law was different from what Werbőczy actually applied. Unlike Dell'Adami, Degré gathered a number of documents which support this contention.<sup>33</sup> Following in the footsteps of Degré, Tringli also accepted that the origin of this part of Werbőczy's work is in Roman law. Roman law and the Digest itself is not as unambiguous on this question as Werbőczy's text or what has been suggested by the later scholarship.<sup>34</sup> The Saxon Mirror (*Sachsenspiegel*) compiled in the early thirteenth century offers a similar resolution to the problems as the solution proposed in the *Tripartitum*, but in the case of the Saxon customary law compilation, the influence of the Digest is more clear-cut according to research.<sup>35</sup> When addressing changes to the waterscape, all three law sources start from the principle that in the case of a rapid shift in the course of a river, the detachment of a piece of land from someone's property and its attachment to someone else's property would not result in a change of landownership. However, while the two customary law collections from the Middle Ages did not include any exception to this principle,

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31 Werbőczy, *The Customary Law*, I/87 (168–70).

32 Dell'Adami, *Az anyagi magyar magánjog*.

33 Degré, *Magyar halászáti jog a középkorban*, and Tringli, "A magyar szokásjog a malomépítésről."

34 See e.g. Engels, "Der verklagte," 204, and Sax, "The Accretion/Avulsion Puzzle."

35 "Svat so dat water afschevet deme lande, dat hevet die verloren des dat lant is. Bricit it aver enen nien agang, dar mede ne verluset he sines landes nicht. § 3. Svelk werder sik ok irhevet binnen enem vliete, svelkeme stade he nar is, to dem stade hort die werder; is he vormiddes, he hort to beiden staden. Dat selve dat die agang, of he verdroget." *Sachsenspiegel Landrecht* II. 56.

the Digest did include a very important one, namely if this shift in the flow of the river proves lasting.<sup>36</sup>

From the point of view of this paper, the most important question is whether the points made by Werbőczy represented practice by the late medieval period or not. The picture that unfolds on the basis of an analysis of court cases from the period up to the early sixteenth century is not straightforward. Based on the above example from the Poprad River valley, one may suggest that Werbőczy summarized the existing customs, but in the following pages, I discuss a number of cases on the basis of which I conclude that, in many respects, Werbőczy applied a different principle than what was prevailing in his time.

In this, the most important step was to gather at least a statistically relevant number of cases. The existing secondary literature refers only to a few examples, but based on an investigation of the most important regesta collections and cartularies, I identified almost sixty relevant cases as part of my research. There would be no point in discussing each case one by one, mostly because, for the most part, little information is provided on the background of the legal case. I chose rather to analyze either cases which for some reason seemed important to an understanding of the different legal norms or cases which showed shifts in practices.

The earliest lawsuit which may illustrate the application of customary law dates from 1338. As indicated by the document, a certain Ivánka son of János Turóci submitted a complaint to the *ispán* (*comes*) of Zólyom County, Master Doncs. According to Ivánka, his interests were harmed by a land transaction that had taken place on Galovany, an estate neighboring his own. Provost Pál son of Gele and Gál son of Jakab son of Albert agreed to exchange certain pieces of land. According to Ivánka's complaint, Pál came into possession of the piece of land that neighbored his. While Ivánka was engaged in growing crops, Pál was herding animals, and according to Ivánka, Pál's animals caused losses to his ploughlands and meadows. Pál, however, claimed that Ivánka had erected boundary markers on fields which he (Pál) had received from the *ispán* himself, Doncs. Ivánka insisted that it was Pál who had erected these boundary markers. Doncs called Pál and fifty witnesses to appear at the convent of Turóc (Kláštór pod Znievom) and testify that it was Ivánka who had erected the boundary markers. The case was further complicated by the fact that Pál was the notary

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36 Dig. 41.1.7.2.

of Doncs. It turned out that it was Pál himself who penned the charter and that it was Ivánka who erected the markers. This element of the case became somewhat obsolete, as the boundaries later changed when the stream called *Porouathka* found a new riverbed and detached a piece of land from Ivánka's estate and attached it to that of Pál.<sup>37</sup> This strongly suggests that, according to both parties, independent of the boundary markers, the boundary between the two properties changed with the change of the stream's bed.

Another case from the following year suggests that similar cases were not always considered in the same way in the Angevin period. In 1339, a case unfolded on the running of the border between two estates, Čoltovo and Lekeňa (part of present day Bohúňovo) in Gömör County, not very far from the area involved in the previous case. The boundary between the two estates at one of its sections was the stream called *Hablucapataka* until the point where it reaches the Sajó River. The litigants were Pál son of Gallus, who owned Čoltovo, and the sons of Miklós Forgách, András and Miklós, who owned Lekeňa. Both parties contended that the other side had taken possession of lands which belonged to them. According to András, Pál artificially let the stream into a new riverbed. The witnesses, however, testified that the change in the course of the river had been caused, rather, by floods. The alluvium carried by the floods, according to the witnesses, filled up the former bed of the stream, and thus the water changed course. The importance in proving that the change in the riverbed was artificial or natural shows that the two cases were assessed differently. Of course, it was the change in the natural riverbed that meant a boundary shift in the period and not the artificial modification of the riverbed. Despite the fact that in this case the riverbed change would have resulted in a change in the ownership of this piece of land, this did not take place. It turned out, during the trial that the whole area in question indeed fell in the land of András Forgách. Thus, the land in question remained in his hands.<sup>38</sup>

From the very same decade, however, there is a case which suggests that for the parties involved not even natural changes to the course of a river implied a change in landownership. For instance, this was the case in 1340 when the boundary between two pieces of lands, Szentmárton and Kóród in Transylvania

37 MNL OL DF 249 510. (For a summary, see *Anjou-kori oklevéltár*, vol. 22. 12–13 no. 5.)

38 MNL OL DL 102 905. (September 4, 1339) For the edition of an incomplete version of the document (MNL OL DL 58 505): *Anjoukori okmánytár*, vol. 3. 597–98 no. 394. For a summary, see *Anjou-kori oklevéltár*, vol. 23. 250–51 no. 529. See on this case in the context of floods Kiss, *Floods and Long-Term Water-Level Changes*, 245–46.

(today both within the borders of Coroisanmărtin), was demarcated, a section of which was formed by the Holt-Küküllő River (a branch or backwater of the Târnava Mică River). Probably because of the less clearly defined riverbed, the two parties decided they would erect boundary markers in the dry section of the bed together. They did so in order to fix the boundary between the lands in case floods washed away the riverbed.<sup>39</sup> This indicates that even natural changes to the boundaries were not associated with a change in ownership or at least that sometimes parties could come to an agreement that went against custom. Probably the show of caution in this case was in the interests of both parties, as it may not have been evident which path the river would choose in if the old riverbed were filled, so none of the landlords would have known if they would have won or lost territories. It is difficult to identify the exact reason for this kind of agreement, as by the time of the First Military Survey (1782–1785), therefore the first precise mapping of the area, this branch of the Kis-Küküllő (Târnava Mică River) had disappeared entirely.

Even clearer proof of the not fully crystallized customary law regarding these cases is provided by a boundary dispute from 1347. The two parties involved were the bishopric of Eger and István son of Pál of Ónod. One section of the boundary between Ónod and Hídvég (present day Sajóhídvég) was the bed of the Sajó River. However, as time passed, the hydrography of the area changed, and two islands emerged with lands (*duabus angulationibus vulgo zygeth vocatis*), as well as a place for fishing (*loca piscaturarum*), on the Ónod side of the river. As part of this hydromorphological change, the main course of the Sajó River started to run within the borders of Hídvég. The sheet of the First Military Survey did not allow the identification of a former bed of the Sajó River between Hídvég, but a detailed mid-nineteenth century manuscript map of the area does.<sup>40</sup> The bishopric of Eger tried to take possession of the abovementioned land, which was worth 13 marks, but István raised an objection against the bishopric's claim. Pál Nagymartoni, the chief justice of Hungary, obliged István and thirteen other nobles to swear an oath that the land in question had belonged to him. As István took the oath along with the noble witnesses required, the lands in question were returned to him. Furthermore, because he had made a false claim, Miklós

39 MNL OL DL 11 742. (January 2, 1340). For a summary, see *Anjou-kori oklevéltár*, vol. 24. 9 no. 2.

40 MNL OL S 73. no. 102. (Pál Szattmári, *Borsod megyebeli Ónod m. város és határának szabályozás előtti térképe*, 1852 [The map of the town of Ónod and its borders before the water regulations, 1852]). Accessed on December 14, 2018: <https://maps.hungaricana.hu/hu/MOLTerkeptar/11395/>

Dörögdi, the bishop of Eger, had to pay 13 marks as a fine.<sup>41</sup> This suggests that, according to the chief justice, the case was clear, and ownership of the land was not changed simply by the fact that it had been shifted from one bank of the river to the other. The fact that the bishop had to pay a fine suggests that Nagymartoni considered this the norm at the time. In light of the few cases discussed above, this is not as clear as is suggested by the chief justice's decision. Rather, this case may have been part of an attempt to create a custom in evaluating similar cases.

Analyses of every single case in which similar issues were involved would be superfluous, as very few considerations would arise which have not been raised by the disputes discussed above. While based on the above discussed examples it is not entirely clear how similar cases were handled in legal norms from the late fourteenth century on, there were only a few cases in which the change in the riverbed did not result in a change in the ownership of lands in questions.<sup>42</sup> Of course, this does not mean that similar riverbed changes did not prompt lawsuits. With the systematic study of similar cases, probably a few hundred such cases could be uncovered. In all likelihood, they would point to the same process identified here, of course, providing a more solid foundation for the conclusions I am suggesting here.

Some of the examples discussed above, apart from the fact that they point to different practices than the late medieval cases, are exceptional from another perspective as well. Among the almost sixty cases discovered, there are only about a dozen that point to natural riverbed changes. In the majority (about three fourths) of the cases, at least some human intervention contributed to the formation of the new riverbeds. Most of the related disputes were centered on the nature of the riverbed modifications. In some cases, this was not as evident as it may seem. Probably due to the less regulated flow of the rivers in the Carpathian Basin, as well as elsewhere throughout Europe, the rivers changed their beds much more frequently than they did in the nineteenth and twentieth centuries, when major regulation works began in the Carpathian Basin. This is

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41 "Autem dominum Nicolaum episcopum Agriensem pro indebita earumdem particularum terrarum litigiosarum requisicione in emenda estimacionis earumdem, scilicet in predictis tredecim marcis contra eundem Stephanum filium Pauli commisisimus sentencialiter aggravari." MNL OL DL 3932. (September 14, 1347), Edited (with parts left out): *Anjoukori okmánytár*, vol. 5. 118–20 no. 55; for a summary, see *Anjoukori oklevéltár*, vol. 31. 445–47 no. 862. See on the document, Kiss, *Floods and Long-Term Water-Level Changes*, 259–60.

42 MNL OL DL 98 381. (For a summary, see *Zsigmondkori oklevéltár*, vol. 8. 251–52 no. 859). See Kiss, *Floods and Long-Term Water-Level Changes*, 293.



not only true for the smaller river branches but also in the case of the major rivers. Of course, in the case of smaller rivers and streams, shifts in the riverbeds were probably almost an everyday process, especially in the lowlands and the hilly areas of the Carpathian Basin. The question in many cases was not the change itself, but whether the river would find its way back to its old bed and would continue to flow in it or not. This is probably why Domitius Ulpianus' *Edict*, which was included in Justinian's *Digest*, forbade any intervention that would change the flow of a "public river" (as he and Roman authors usually refer to permanent waters) after a flood or under any other circumstance. This goes back to the assumption that rivers the course of which had shifted would eventually return to their original beds, presumably at the lowest water-level, which was generally reached in the summertime.<sup>43</sup> This is why the *Digest* had different principles on the basis of which short-term and long-term modifications of riverbeds that also constituted estate borders were adjudicated.

Nonetheless, in many cases riverbeds were modified after earthworks which caused rivers to find a new bed. Sometimes these works were probably difficult to identify, as indicated by the legal evidence from a number of cases from medieval Hungary.<sup>44</sup> In some cases, pieces of lands considerable in size were attached to other land in this way.<sup>45</sup> In these cases, because of the major income that was foreseen from the lands in question, the river walls were torn down and channels were dug to divert the waters. Since many of the lawsuits were centered around the way in which a river's flow had been modified, it is more or less obvious that the two were treated differently in the legal practice of the late medieval period. While the change of a river's flow as a consequence of natural hydromorphological processes without direct human intervention went with a change in the ownership, in case the opposite—direct human intervention to a

43 Dig. 43. 12, 13. 1–13, 15. For an English translation, see *The Digest of Justinian*.

44 E.g. MNL OL DL 52 420, 91 893 (For a summary, see *Zsigmondkori oklevéltár*, vol. 2. 186 no. 61), DF 207 457. (For a summary, see *Zsigmondkori oklevéltár*, vol. 1. 15 no. 138; edited in: Dreska, "A pannonhalmi konvent hiteleshelyének," 13), DL 53 871 (For a summary, see *Zsigmondkori oklevéltár*, vol. 5. 191 no. 571, edited: Ortway and Pesty, *Oklevelek Temesvármegye és Temesvárváros történetéhez*, 511–12), 53 984. (For a summary, see *Zsigmondkori oklevéltár*, vol. 6. 380 no. 1377, edited: Ortway and Pesty, *Oklevelek Temesvármegye és Temesvárváros történetéhez*, 543), DL 53 990 (*Zsigmondkori oklevéltár*, vol. 6. 405 no. 1499), 66 938, 16 498, 39 456 (for a summary, see Fekete Nagy, "A Petróczy levéltár középkori oklevelei," 261–62 no. 202), 36 393 (here: p. 87–88 no. 2. For a summary, see Jakó, *A kolozsmonostori konvent*, vol. 1. 717–18 no. 2022), 17 372. (Olexik, "Középkori levéltártörténeti adatok," 270–71 no. 9), 65 632, 83 932, 95 726, 106 744 (K. Németh, "Vizek és vízgazdálkodás, I," 7 and idem, "Vizek és vízgazdálkodás, II," 9. (erroneously dating the document to 1505), 29 981, and 63 037.

45 E.g. MNL OL DL 30 554.



river's flow—was demonstrated during court cases, it did not touch the ownership of the lands in question.

One further note should be made at this point. These alterations to the flow of rivers were probably not always intended as a way of gaining possession of someone else's land. A case from the early fifteenth century indicates the extent to which some of the interventions to a river had unexpected and, more importantly, unwanted consequences, even for those who actually committed the intervention. In 1405, two sons of Pető of Gerse, János and Tamás, submitted a complaint regarding the construction of a new channel by the Sárvíz Stream between their Gerse and Sármelléke estates (now both part of Gersekarát) and the estates of the nobles of Telekes. The Pető sons had made the new channel, which was meant to provide water for a new mill they had built. The stream most probably had a small discharge, so the whole of its flow was diverted into this artificial channel. It is reasonable to assume that the stream was small, since the valley in question today lacks a permanent water flow and only fills with water after rainfall. The construction of mills by similar (similarly small) streams was not unique to pre-modern times. Later, these mills were often referred to in Hungarian as *pokolidő* (meaning “storm time”) or *felbőlt kiáltó* (“sky squalling”) mills, as they only could function when the runoff of stream they were built on grew as a consequence of rainfalls.<sup>46</sup> Because of the diversion of the water, the old riverbed, which from that time on probably received no water for most of the year, started to silt up. The nobles of Telekes used this change to their advantage. They started to consider the channel as the new riverbed and border between Telekes and the estates of the Petős, and they started to use the meadows between the two branches of the river as their own. Even if the new riverbed was meant to serve the interests of the Pető family, it resulted in the detachment of their estate and the occupation of these areas by the nobles of Telekes.<sup>47</sup>

### *Conclusions and Outlook*

This paper was intended to provide an overview of the Hungarian legal customs under a special legal circumstance in the Middle Ages. Before any further conclusions it is worth noting that the problem raised by Bartolus in his treatise quoted in the introduction, marginal as it may seem at a first sight,

46 Anon., “Vízimalmok,” 169–87. Available online: <http://mek.niif.hu/02100/02152/html/03/23.html> (accessed on: May 16, 2019) and Takáts, *Művelődéstörténeti tanulmányok*, 177, 350.

47 MNL OL DL 92 239 (for a summary, see *Zsigmondkori oklevéltár*, vol. 2/1. 446 no. 3726).

probably had some actual practical relevance. Although the almost sixty cases identified by me in the course of my research and presented here are anything but comprehensive, they provide a sample which nonetheless allows us to identify different practices and customs. A systematic study of a more significant proportion of the available source material probably would have yielded similar results, although the formation of the legal customs in similar cases may be seen in a more nuanced manner. The sources discussed above nonetheless suggest that from the Angevin period on, the changes in riverbeds caused recurrent property disputes. While the cases from the fourteenth century do not show a clear pattern, from the fifteenth century on, in an overwhelming majority of the similar cases, the change of the riverbed went hand in hand with a change in the ownership of the connected piece of land. This suggests that by the fifteenth and early sixteenth century, there was a more or less settled customary law on the basis of which similar cases were adjudicated. In the meantime, the sources also point to the fact that most of these riverbed changes were not or not solely outcomes of natural hydromorphological processes, but rather were results of intended interventions in the flow of the rivers. Of course, in these cases the legal customs mentioned immediately above did not apply.

In many cases, however, it was not easy to identify these human interventions, especially because, as shown above, sometimes these processes were partly artificial and partly natural, and sometimes these changes were not intended by the persons who ordered earthwork or construction work by a river. Although none of the above mentioned cases suggest this *per se*, in many cases probably the change in the riverbed may have been caused indirectly by interventions at entirely different sections of the same water flow. The rather ambiguous nature of these changes was identified already in the Middle Ages, which is probably why Werbőczy attempted to change the existing legal customs in his *Tripartitum*. As noted, to some extent, he applied Roman law by building on some of the points of Justinian's *Digest*. In contrast to what has been suggested in the earlier secondary literature, however, he did not fully accept the Roman legal tradition, but modified it to clarify similar situations as much as possible. By stabilizing the borders of estates even in cases involving changes to the bed of the border river, he probably thought he had put an end to similar disputes.

Although the focus of this paper is not the Early Modern period, it is certainly worth considering the relevance of the conclusions I have drawn to similar legal procedures in the sixteenth and seventeenth centuries. However, the collection in this case could hardly be considered comprehensive, unlike in the case of the

Middle Ages, so it would be foolhardy to generalize. However, at least one thing is clear from the few sources on which the existing literature rests. First, in the period of roughly 100 years following the compilation of the *Tripartitum* and the fall of the medieval Kingdom of Hungary to the Ottoman Turks, the legal principles put down in writing by Werbőczy were not systematically applied. Rather, the *consuetudo* was in effect.<sup>48</sup> Nonetheless, almost 150 years after the completion of Werbőczy's *Tripartitum*, his principles were accepted as law. In 1655, Act 81 took the relevant passages of the *Tripartitum*: “With regard to lands which by [flash] floods or floods that happened or happen slowly were carried away from a land and were attached to another, Book 1 Title 87 of the *Tripartitum* has to be applied.”<sup>49</sup> Although by this time many points of the *Tripartitum* had become standard points of reference and many of them were also accepted as laws of the Kingdom of Hungary, the practice in the problem discussed above still was not consistently applied. There is a source from the year in which Act 81 was accepted by King Ferdinand III which points to an unresolved problem. In December 1655, the *provisor* of one of the most influential noble families in Transdanubia, the Batthyány family, was involved in a lawsuit in Dobersdorf (part of present day Rudersdorf) which concerned pieces of land by the Lafnitz River. In the letter, it was Magdolna, the sister of Ádám Batthyány (1610–1659), the landlord of the estate complex of the family informed him of this property dispute. According to the letter, the family insisted that, even if the river changed its bed, the lands would not change hands.<sup>50</sup> The opposing party, however, took a different position. This may be due to the fact that the Lafnitz River in this section was the border between the Kingdom of Hungary and the Habsburg duchies,<sup>51</sup> so the legal practice was different. In such cases, there was no reason to give a priority to the Hungarian legal system. Nonetheless, it was probably in this period that similar lawsuits almost entirely disappeared from Hungarian court cases.

48 For legal practice that was not in accordance with the *Tripartitum*, see e.g. Szádeczky, *Székegy oklevéltár*, 5. 61–63 no. 935 and 63–65 no. 936 (Cf. Degré, *Magyar halászhajó jog*, 138 and Tringli, “A magyar szokásjog,” 262 [1547]). See also Tóth, *Vas vármegye közgyűlése*, 243 no. 719 (November 23, 1600)

49 “In facto territoriorum, per exundationem; vel sensim factam aut fiendam alluviem aquarum, ab uno territorio avulsorum, et alteri adjectorum; observetur tit. 87. partis 1. §.” 1608–1657. *évi törvénykezések*, 632.

50 “S egiebirantis az dobrai földeket az ide valo hatarhoz szakasztotta az Rába visza, de attal ugian nem idegenithetik el Dobrától” (“The Rába did attach the lands in the borders of Dobra to our borders but it does not mean that they could be alienated from Dobra”) The letter of Magdolna Batthyány to Ádám Batthyány, MNL OL P 1314 no. 5104. (December 30, 1655).

51 See the contributions of Bence Péterfi and Renáta Skorka in the present issue. See also: Vörös, “Ein Grenzkonflikt zwischen Steiermark und Ungarn.”

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